No. 7306

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ETHLYN B. CLEMENTS, individually and as administratrix of the estate of Ralph L. Clements, also known as R. L. Clements, deceased,

Appellant,

vs.

GEORGE W. COPPIN, as trustee in bankruptcy of the estate of the Flintex Corporation (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

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This brief is filed with consent of the court, and supplements briefs herein by Thomas F. McCue, Esq., associate counsel for appellant.

RESUME OF FACTS.

1. Pay over order of District Court, dated and filed May 22, 1933. (Tr. 1-3.)

The main case from which the contempt proceedings issued was an action in equity to fasten a trust upon certain funds of said Flintex Corporation which wrongfully and fraudulently came into the hands of appellant in part as an individual and in part as administratrix of the estate of her deceased husband, Ralph L. Clements.

The case was tried twice, each time resulting in a decree in favor of appellee, creating an involuntary trust as to said funds and granting a reference for an accounting to W. E. T[illegible]er, Esq., as Special Master. An appeal was taken to this Court from each of said decrees, the first was reversed upon jurisdictional grounds which objection was removed prior to the second trial. (*Matthew v. Coppin,* 32 Fed. (2) 100). The decree from which the second appeal was taken was affirmed. (*Clements v. Coppin,* 62 Fed. (2) 552.

On the 21st day of April, 1933, the Special Master filed a report in which he found that $22,500.00 of said trust funds passed into the hands of appellant as an individual, and that of said sum there was $11,-979.00 in her possession and control; that $7,259.12 of said trust funds passed into her hands as administratrix of the estate of her deceased husband, and that $4,805.20 of said sum was in her possession and under her control. (R. 1-3; 10-14).

No objections or exceptions were reserved by appellant as against said report, and on the 22nd day of May, 1933, upon hearing, the United States District Court adopted and confirmed the report of said

Special Master and issued the turn over order in question, dated May 22nd, 1933, directing appellant to turn over said trust funds to the Clerk of said United States District Court within ten days from the date of service of said order upon appellant. (R. 1-3).

Upon the termination of said ten days, and on June 3rd, 1933, appellant filed a purported answer to said turn over order of May 22nd, 1933, denying possession or control of said trust funds. (R. 3-4). The appellant failing to comply with said turn over order within the time indicated therein, or at all, the Court issued an order directing appellant to appear upon a day certain, to-wit: the 19th day of June, 1933, and show cause why she should not be adjudged guilty of contempt for failure to comply with said order. (R. 8-10). Said order to show cause came on for hearing on said return day, and appellant with her counsel appeared and made an informal motion for a re-reference to the Special Master to re-open the hearing before said Special Master and to permit her to present evidence which she had failed to do before the making of said turn over order. (R. 16-19). Neither the character of the evidence sought to be introduced before the Special Master was revealed, nor was any reason assigned why such evidence was not presented to the Special Master prior to the turn over order and during the hearing before him.

The motion was denied, to which no exception was taken. No affidavit, or any other paper, was filed by appellant in answer to said order to show cause, nor

mitting her to jail are both void for the following reasons:

1. Affidavit upon which the order to show cause was based is defective.

2. No hearing was had on the issue raised by the verified answer of defendant to the pay over order.

3. District Court did not afford defendant her constitutional right to be heard.

4. Decrees of District Court do not contain findings.

5. Decrees do not show defendant's ability to comply with the turn over order. The answer of defendant stands unchallenged and is a complete answer to order to show cause.

6. Decrees are in effect an imprisonment for debt.

ARGUMENT.

I.

AFFIDAVIT DEFECTIVE.

The affidavit upon which the order to show cause was based was made by Martin Dinkelspiel, attorney for plaintiff. (Tr. 5-6.)

The affidavit recites the making of the pay over order, and alleges on information that defendant has disobeyed said order and failed and refused to pay over to the clerk of the court the funds mentioned in said order; wherefore the affidavit prays for an order directing defendant to show cause why she should not

be adjudged guilty of contempt for failure to comply with said order.

Said affidavit was filed subsequent to the making and filing of the verified answer of defendant denying that she had in her possession or under her control the funds mentioned in said pay over order, or any part of such funds, and that she was accordingly unable to comply with said order. Plaintiff and appellee thus had full knowledge of the position of defendant, and completely ignored her answer in framing such affidavit. In any event such affidavit in order to support a judgment of contempt must allege that defendant *is able to comply* with the order, and particularly so here where defendant's answer was on file. Furthermore, said affidavit asks merely for an order to show cause why defendant should not be adjudged guilty of contempt. No punishment for contempt is asked.

In *Berger v. Superior Court,* 175 Cal. 719, 720, Chief Justice Angellotti, in delivering the opinion of the court, said:

> "It is thoroughly settled in this State that the affidavit by which a contempt proceeding is instituted, in order to sufficiently support an adjudication of contempt, must state facts constituting the offense. It is the complaint in such a case, and if defective in that respect, the adjudication cannot stand."

The affidavit did not state facts constituting the offense, for there could be no offense without ability to perform, and the affidavit contains no allegation of such ability. Nor can a court grant relief not asked

for in the prayer of the complaint, the affidavit here. Yet the court committed the defendant for contempt.

The court in *In re Cole*, 163 Fed. 180, 186, says:

> "The great fullness with which we have explained this proceeding, and the practice in regard thereto, will be found to have been necessary. For example, the petition on which Mrs. Cole was ordered by the District Court to be incarcerated is only such as would be required for ordinary supplemental proceedings for recovering a debt. It shows only that Mrs. Cole had been ordered to pay and had not. It contains no allegation that her failure to pay was wilful, nor anything to show that it was not caused by mere inability. Applying strict rules, this, of course, would not be sufficient to put her on the defensive."

II-III.

NO HEARING HAD ON ORDER TO SHOW CAUSE. COURT DID NOT AFFORD DEFENDANT CONSTITUTIONAL RIGHT TO BE HEARD.

On the hearing of the order to show cause an issue was presented by defendant's verified answer. (Assuming for argument that affidavit of plaintiff was sufficient.)

At such hearing the only evidence before the court was said answer. Appellant maintains that not only was no further evidence offered, but that appellant had no opportunity to offer further evidence. This is shown in effect by the minute order of the court (Tr. 15-16), prepared *at the time*.

Three months after said hearing a statement of the court on the hearing to show cause was filed, wherein it is said (Tr. 18):

> "The court denied the motion for a re-reference, no further evidence of any character being offered by defendant, nor heard by the court in behalf of either party."

Defendant's answer is therefore the only evidence in the record and it stands unassailed.

No citations are needed on the point that a court cannot go outside of the record to find facts and conclusions of the law upon which to base a decree.

The court in *Moody v. Cole,* 148 Fed. 295, 297, said:

> "The courts have held with great clearness that the power of commitment should be cautiously exercised, and only when its propriety is beyond reasonable doubt. * * * The courts of bankruptcy have also held that the answer of the respondent to the rule to show cause is not conclusive, but traversable; that weight should be given to the denial of the bankrupt, but that *it is the duty of the court to examine all the evidence,* both circumstantial and direct, *relating to the matter.*" (Italics ours.)

The court below did not examine *any* evidence, much less *"all the evidence * * * relating to the matter."* There was *an issue before the court*—whether or not defendant had *the ability* to comply with the turn over order. But the court disregarded the issue, received no evidence (except the answer of defendant) and made its orders arbitrarily.

At the hearing of the order to show cause counsel for defendant made a motion for a rereference of the matter to the master. No court reporter was present at the hearing. Said motion for rereference was promptly denied, and without giving counsel an opportunity to be heard further, and without permitting defendant herself to be heard, the court immediately ordered defendant committed into the care of the U. S. Marshal, the orders and decrees being signed and filed later.

The court must *try* the question of contempt. (See *In re Cole,* 163 Fed. 180, 184-5.)

In *Boyd v. Glucklich,* 116 Fed. 131, at pages 134-5, the court say:

> "The alleged contempt in this case was not committed in the presence of the court, and is therefore what the law denominates a 'constructive contempt.' It is a criminal offense for which the punishment may be imprisonment without limit of duration, and one charged with it has the same inalienable right to be heard in his defense that he would if charged with murder or any other crime. (Cases cited.) In Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205—a proceeding to punish for contempt—the supreme court said:
>
> 'There may be cases, undoubtedly, of such gross and outrageous conduct in open court on the part of the attorney as to justify very summary proceedings for his suspension or removal from office; *but even then he should be heard* before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essen-

tial to the security of all private rights. Without its observance, no one would be safe from oppression wherever power may be lodged.'

And this was said in a case where the alleged contempt was committed in the presence of the court."

IV.

DECREES OF DISTRICT COURT LACK FINDINGS.

No record of the facts found by the master are before this court, nor is the master's report.

A court has no right to adjudge a party to be in contempt of court without making findings of fact showing as a matter of law that the party accused is in fact guilty of contempt.

The court in *Samel v. Dodd,* 142 Fed. 68, 73, said:

> "It follows unquestionably that an order imprisoning a bankrupt for contempt for failure to obey a decree to pay money or surrender goods into court is erroneous as a matter of law, where the bankrupt by sworn answer denies that he has the money or the goods, and it does not appear clearly and affirmatively from the record, notwithstanding his denials, that he has the power to comply with the decree."

The above case was quoted with approval in *In re Cole,* 163 Fed. 180, 189.

In the decree entitled "order of imprisonment" (Tr. 10), there are recitals that in his report the *special master found* certain moneys had passed into the hands of the defendant, and that a certain part

of such moneys "remain in her hands and *unaccounted for.*" This is not a finding by the District Court, nor is it a finding of fact. Even if it could be considered a finding of fact by the court, still there is no finding as to *when* the funds remained in defendant's hands, or whether she *now* has them and is *able* to comply with a turn over order. There are actually no facts in the record relating to the accounting. The only evidence before the court on the hearing of the order to show cause was the verified answer of defendant.

In *In re Cole,* 163 Fed. 180, at page 188, the court say:

> "Notwithstanding the combined judgment of both the learned judge of the District Court and the referee which, of course, in accordance with the decisions, should have great weight on a question of fact like this, we find that there was in fact not sufficient evidence of the kind which the law requires on the exact issue pending here; that is to say, whether Mrs. Cole willfully refused to pay over moneys which it was necessary to show that she could pay over at the specific date to which the orders of the court properly related. Under the rules which touch petitions of this character, which permit only revision in matter of law, we could not interfere with the decree of the District Court of March, 1905, because, under the circumstances, we would not be justified in declaring that there was not sufficient to permit the District Court to pass on the question whether, as a result of collusion between Mrs. Cole and her husband, a mere debt according to the rules of civil procedure might not have been established against both her and her husband, or either of them; *but*

when it comes to the proposition that, at any specific date or time to which the proceedings might refer, Mrs. Cole had so completely under her control funds which she could command that her failure to command them was a willful contempt of the court, or when it comes to the issue that funds might not have been squandered, or even wrongfully disposed of by sending them to her husband's brother, or in some other way, *there is such failure of proof that even the determination of the District Court cannot supply it.*" (Italics ours.)

In *Boyd v. Glucklich,* 116 Fed. 131, at page 140, the court say:

> "*The ability of a bankrupt to comply with the order of the court must be made to appear, before he can be punished for contempt. And it must be made to appear by evidence which leaves no reasonable doubt in the mind of the court on that subject.* Evidence which is merely persuasive will not suffice. He cannot be imprisoned for the purpose of exploitation." (Italics ours.)

In *In re Rogowski,* 166 Fed. 165, it was held that, if it is impossible to point to any particular property or money, and definitely and specifically locate it, contempt proceedings are not justified.

Decree must contain findings of fact.

Oates v. United States, 223 Fed. 1013;
Terminal R. R. v. United States, 266 U. S. 17, 69 L. Ed. 150, 155.

V.

ABILITY TO COMPLY WITH TURN OVER ORDER.

Nowhere, in the decree or in the record, is the question of the ability of defendant to comply with the turn over order determined *or even considered or mentioned.*

In *Boyd v. Glucklich* (supra), pages 138-9, the court quote with approval and say:

> " 'By that order it is adjudged that the defendant has within his control $10,000 in money, of the proceeds of the goods of the defendant firm, and he is required to pay over that sum to the receiver immediately. The defendant denied absolutely that he has either property or money of the firm within his power or knowledge. There is no direct evidence that his denial is not true. The court's conclusion seems to rest exclusively upon the inference that, because the defendant firm had a large amount of property some two years ago, the defendant has it now. This is hardly a satisfactory basis for so severe a proceeding. The experience of business men shows that such a conclusion is often a very violent non sequitur from such premises. The logical consequences of such reasoning will often produce the greatest injustice. * * * *No man can be imprisoned for mere inability to pay his contract debts, nor for failing to pay over to a receiver money which he does not have. Nor should there be involved in the modern administration of jurisprudence any considerable peril of such consequences.'*
>
> This case is on all fours with the case at bar, and lays down the only safe rule in such cases." (Italics ours.)

And at pages 140 and 141:

"*The failure of the bankrupt to pay through inability lacks the essential element of contempt. Inability to comply with the command of the court is always a complete defense to a charge of contempt.* It cannot be imputed to any one that he is guilty of a contempt of court for neglecting or refusing to do what it appears is out of his power to do. An order of commitment in such case is void."

"No man can be imprisoned for a constructive contempt on suspicion or conjectures, or upon inferences which may or may not be well founded. For this reason from the earliest times the doctrine has obtained that *when one accused of a constructive contempt in a court of law denies positively and specifically the alleged contempt, under oath, the proceeding against him for contempt must be dismissed.* In Rex v. Sims, 12 Mod. 511—one of the earliest cases to be found in the books on the subject—this is the opinion:

'Per Curiam. If one brought in, in contempt, deny all upon oath, he is, of course, discharged of the contempt; but, if he has forsworn himself, he may be prosecuted for perjury.'

Mr. Blackstone says:

'If the party can clear himself upon oath, he is discharged, but, if perjured, may be prosecuted for the perjury.' 4 Bl. Comm. 288.

The doctrine thus laid down is still the rule followed by courts of common law; those courts uniformly holding that, if one accused of a constructive contempt fully answers all the charges on his oath, he must be discharged; *the answer must, for the purposes of the contempt proceed-*

ings, be taken as true, and extrinsic evidence cannot be received to impeach it. *And this is the doctrine in the federal courts.*" (Italics ours.)

VI.

DECREES ARE IN EFFECT IMPRISONMENT FOR DEBT.

Because of the inability of defendant to comply with the turn over order the decrees of the lower court herein constitute imprisonment for debt, and are therefore void as in conflict with the Constitution of the United States.

In *Boyd v. Glucklich* (supra), at page 136, the court say:

> "A court of bankruptcy cannot sentence a bankrupt to imprisonment for debt, any more than any other court of the United States can do that thing; and what it cannot do directly it cannot do by indirection, under another name. It cannot, therefore, lawfully order a bankrupt to deliver to the trustee money or property he has not got in his possession or under his control, and imprison him if he does not comply with the order. Plainly, that would be imprisonment for debt, and the order is not relieved of that illegal and odious quality by calling it 'imprisonment for contempt.' The court that makes such an order is in contempt of the law and constitution, and not the bankrupt in contempt of the court."

Ex parte Jansten, 154 Cal. 540, 545; Held: An order in a contempt proceeding directing party to be imprisoned until he has complied therewith is void unless

party is able to make such payment, since there is no imprisonment for debt in the United States.

In conclusion this counsel for appellant asks the indulgence of the court to say, or to admit, that the position in which appellant finds herself today is largely due to the inexperience of counsel in court practice. I represented appellant in the long drawn out proceedings before the master, as a matter of friendship and without compensation, because appellant had no money to employ other counsel. I absolutely know of the right and justice of appellant's cause, and I shall continue, with every resource at my command, to fight for that cause to the end that justice shall be done and appellant vindicated.

Wherefore appellant asks for a judgment of this court reversing the judgment and decrees of the District Court finding appellant guilty of contempt and committing her to jail, and that appellant be discharged from custody; and for appellant's costs herein.

Dated, San Francisco,
April 9, 1934.

Respectfully submitted,
CLARENCE G. ATWOOD,
Attorney for Appellant.